U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 1 1 2015

FILE#:
PETITION RECEIPT#:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision.** The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) denied the immigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed the appeal. The matter is again before us on a motion to reopen and motion to reconsider. The motion to reopen will be granted, the motion for reconsideration will be denied. The director's decision will be affirmed, and the petition will remain denied.

The petitioner describes itself as a private school. It seeks to permanently employ the beneficiary in the United States as an education coordinator. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] On May 3, 2014, the director denied the petition because the petitioner did not demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

On July 31, 2014, we summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v), as the appeal did not identify specifically any erroneous conclusion of law or statement of fact.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon motion. We may deny a petition that fails to comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.[2] On motion, the petitioner submits a brief and financial documents.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a) provides, that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

On motion, the petitioner states that it did not submit a legal brief in support of the appeal because it anticipated that the entire record, including a response to a notice of intent to deny (NOID), would be forwarded to and adopted by our office pursuant to our *de novo* review. Although Part 4 of the Form I-290B states that an appellant must provide a statement regarding the basis for its appeal or motion and the petitioner did not submit such a statement with its appeal, the motion contains a brief which contends that the director erred in concluding that the petitioner did not establish that it had the continuing ability to pay the proffered wage and attaches new financial documentation in that regard. Therefore, the petitioner's motion qualifies for reopening.

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Ability to Pay

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The proffered wage as stated on the ETA Form 9089 is $44,700.00 per year. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in and to currently employ 25 workers.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements reflect that the petitioner paid her $28,033.90 in 2013 and $31,134.96 in 2014. As such, the petitioner paid the beneficiary partial wages in 2013 and 2014 and must establish that it had the ability to pay the difference between the actual wages paid and the proffered wage in 2013 and 2014.[3]

On motion and in response to our February 4, 2015 request for evidence (RFE) the petitioner notes that the beneficiary was on unpaid maternity leave in 2013 and was absent from the United States from July 2014 through October 2014. The petitioner contends that the beneficiary's paystubs from July 2014 through March 2015 show that her bi-weekly salary is $2019.29, or $48,462.00 per year. If the petitioner does not pay the beneficiary for vacation/leave, this has no bearing on the overall wages paid to the beneficiary. In the instant case the proffered wage listed on the Form 9089 is an annual wage. We will not consider an hourly wage to account for unpaid vacation hours by

[3] The difference between the actual wages paid and the proffered wage is $16,666.10 in 2013 and $13,565.04 in 2014.

the beneficiary. Rather, we will look to other evidence described in 8 C.F.R. § 204.5(g)(2) to determine whether the petitioner has the ability to pay the difference between the proffered wage and wages already paid to the beneficiary.

On motion, the petitioner contends that its bank account statement reflects that it had sufficient ending balances in 2013 to cover the difference between the actual wages paid and the proffered wage. The petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. We further note that the bank statements in the record are for an account in the name of and not the petitioner.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. The courts have specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano,* 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. *See River Street Donuts,* 558 F.3d at 118 and *Chi-Feng Chang,* 719 F. Supp. at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the

proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4]

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. The petitioner's tax return demonstrates its net income and net current assets as:

Tax Year	Net Income	Calculation of Net Current Assets	W-2 Wage	Balance Due to Instant Beneficiary
2013	-$72,585.00	-$306,019.00	$28,033.90	$16,666.10

The petitioner did not provide its 2014 tax return. Therefore, for the years 2013 and 2014, the petitioner did not have sufficient net income or net current assets to pay the difference between the actual wages paid and the proffered wage.

According to USCIS records, the petitioner has filed two (2) other Form I-140 immigrant petitions on behalf of other beneficiaries which are relevant to the instant priority date.[5] Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). In our RFE we made the petitioner aware of these other Form I-140 immigrant petitions and requested relevant information regarding those beneficiaries. However, the petitioner only provided an approval notice for one (1) of the Form I-140 immigrant petitions, but did not provide the proffered wage and evidence of any 2013 wages paid to the beneficiary of this Form I-140 immigrant petition.[6] The petitioner did not provide any evidence on the beneficiary of the other Form I-140 immigrant petition. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] USCIS records reflect that beneficiaries of other Form I-140 immigrant petitions had become lawful permanent residents before the priority date of January 23, 2013.

[6] The petitioner's 2014 Form 941, Employer's Quarterly Federal Tax Returns reflects that the petitioner paid the beneficiary of this Form I-140 immigrant petition $2,076.48 in 2014.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not provide information regarding beneficiaries on whose behalf it filed Form I-140 immigrant petitions, rendering us unable to determine whether it had the ability to pay the proffered wages to each beneficiary. While the petitioner contends that it's declining net income from 2011 through 2012 were due to unexpected financial losses in 2012, there is no evidence in the record to support such an assertion. The petitioner's 2013 tax return reflects a continuing decline in the petitioner's net income. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Nothing in the record demonstrates that the tax returns paint an inaccurate financial picture of the petitioner. There is no evidence in the record of the historical growth of the business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the business' reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Bona Fide Job Offer

Beyond the decision of the director,[7] we find that the petitioner has failed to establish that there is a *bona fide* job offer.

[7] We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v.*

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The labor certification indicates that the beneficiary will be employed by the petitioner at The petitioner claims that it is doing business at this location as and that is not an independent entity, but a school which is under the petitioner's management. While the record contains evidence that the petitioner registered the " as a trade name, it was not registered until after both the labor certification and Form I-140 immigrant petition were filed. Further, Maryland Department of Assessments and Taxes records indicate that was incorporated on and remains an active corporation. *See* http: (accessed January 15, 2015). Further, with Federal Employer Identification Number (FEIN) issued Forms W-2 to the beneficiary in 2011 and 2012. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to our RFE, the petitioner referenced a letter from its accountant explaining that the is not an independent entity but is included as one of the schools under the petitioner's management. The accountant asserts that all profit and loss of the are reflected in the petitioner's tax return. However, the petitioner's tax returns make no reference to the as an entity under the petitioner's management or affiliated with the petitioner. The only other entity listed on the petitioner's tax return is Nothing in the record specifically addresses why has its own FEIN or how it issued paychecks and a Form W-2 to the beneficiary in 2011 and 2012 if it is not a separate entity from the petitioner. The petitioner did not provide independent, objective evidence to overcome the noted inconsistencies and to establish that the job offer to the beneficiary is *bona fide*.

ORDER: The motion to reopen is granted, the motion to reconsider is denied. The previous decision of the director is affirmed. The petition remains denied.

United States, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).